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October Term, 1908.

No. 676.

FRANK BAILEY [redacted], Intervenors, Petitioners,

vs.

EDWARD O. PROCTOR [redacted], Receivers.

BRIEF OF RESPONDENT RECEIVERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD O. PROCTOR, for himself and
EDWARD F. GOODE as Receivers.

ANDREW G. CHEESMAN & SON, LAW PRINTERS, DENVER.

Subject Index.

Table of Authorities Cited.

CASES.

Supreme Court of the United States.

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v.

EDWARD O. PROCTOR ET AL., *Receivers.*

BRIEF OF RESPONDENT RECEIVERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE POINTS OF DECISION OF WHICH REVIEW IS SOUGHT.

The petitioners seek review of a decision of the Court of Appeals for the First Circuit affirming an order of the District Court, District of Massachusetts, granting the receivers of Aldred Investment Trust a final allowance of $170,000 in addition to $75,000 previously granted them, and authorizing the receivers to pay $18,000 to Putnam, Bell, Dutch & Santry for certain legal services performed for the Trust before and during the receivership.

The memorandum of decision of the District Court upon the allowance to the receivers is at pages 30-32 of the Record. The Per Curiam opinion of the Court of Appeals, holding that the allowances "fell within the allowable limits of the district court's discretion," is at pages 59, 60. It is officially reported in 171 F. (2d) 980.

The petitioners claim that the allowance to the receivers was excessive, and that said allowance and that to the Putnam firm were based upon an inadequate record.*

BRIEF STATEMENT OF FACTS.†

The essential facts are contained in the receivers' statements in support of their joint petition for allowance (received without objection) (R. 5-20); the transcript of the hearing (R. 32-53); seven documentary exhibits (transmitted to the Court of Appeals) (R. 55), and the records and opinions of the Circuit Court of Appeals on six previous appeals (R. 56; referred to by the Court of Appeals, R. 60).‡

The petitioners are a group of shareholders who bought the so-called "free shares" of the original defendant trustee Hanlon, January 15, 1946 (R. 10) (nearly a year after the receivers' appointment), and, on the strength of their ownership of the shares so acquired, intervened in these proceedings February 19, 1946 (R. 2, 3). They were the only opponents of the receivers' petition for compensation.

*The petition (at p. 4) alleges that "In the course of the receivership, the District Judge made other allowances to attorneys aggregating $119,000," which, in the following paragraph, are included as "expenses of administration" in bringing "the administrative costs of the receivership to approximately $450,000" (R. 4). This is incorrect. The $119,000 was not an administrative cost of the receivership. Of this amount $89,000 was paid to lawyers who had brought a minority stockholders' bill against the Aldred Trustees which the S.E.C. had the benefit of in its suit (see *Bailey* v. *McLellan*, 159 F. (2d) 1014); $20,000 was paid to counsel for a committee of debenture holders, and $10,000 to counsel for these petitioners.

†The petition and supporting brief contain so many erroneous and misleading statements that our statement of facts is longer than it would have been otherwise.

‡Some of the alleged deficiencies of proof of the receivers' services are supplied by these exhibits and records which the petitioners have not upon this petition brought before this Court.

The complainant Securities and Exchange Commission appeared by counsel and recorded its belief that the allowance of the amount claimed was within the sound discretion of the Court (R. 32, 33, and Opinion of Court of Appeals, R. 60). Furthermore, counsel for these very petitioners, when queried by the District Judge as to what he believed was fair compensation, stated: "as a practical matter . . . the range of fees ought to be between $150,000 and $180,000 gross, that being the range indicated by the Bankruptcy Act according to the amount of the estate, which was between eight and one-half and nine million dollars . . . ," which, he stated, "I think would be an extremely fair and defensible award and based upon a rational standard in evaluating the receivers' service" (R. 50).*

The petitioners have not fared ill. For the shares which they purchased from Hanlon at $150,000 they are receiving $1,144,000, a profit of nearly $1,000,000 (R. 18, 19), and they have been permitted to continue the existence of the Trust solely that they may not be required to pay a capital gains tax on this profit. *Bailey* v. *Proctor,* 166 F. (2d) 392 (1948).

On January 19, 1945, the District Court appointed Edward O. Proctor, a lawyer, and Edward F. Goode, an employee of the investment firm of Spencer Trask & Company (R. 19), receivers of Aldred Investment Trust. The date of the allowance of their compensation was July 29, 1948 (R. 30). They had, therefore, been receivers three and a half years. The aggregate assets of the Trust when the

*At the time Mr. Gould made this statement Mr. Proctor stated: "I would just like to point out, your Honor, that Mr. Gould's figure of $180,000 is $65,000 less than the amount we are asking for. I think that $65,000 would not be too far out of the way to allocate to the litigation which was entirely in addition to the [usual] services rendered to the estate"; to which Mr. Gould replied: "I must say in reaching that figure I had assumed that included in it all of the services, including the litigation" (R. 50).

receivers took them over were worth approximately $3,640,000. Against these assets there was an outstanding indebtedness represented by debentures in the amount of $5,900,000 carrying 4½% interest (R. 6). The liabilities, therefore, at that time exceeded the assets by approximately $2,300,000 (R. 6, 7).

During the receivership, over the opposition of these petitioners, the $5,900,000 of debentures were paid in full, with accrued interest. Interest payments during the receivership totaled $685,875. The 171,500 common shares which at the beginning of the receivership had no value have a liquidating value of approximately $10.40 a share. During the receivership, therefore, a deficit of approximately $2,300,000 was translated into an equity of almost $1,800,000 (R. 7).

One of the principal assets of the Trust (the acquisition of which by the trustees was the immediate cause of their removal) was 14,991 shares (a bare majority) of Eastern Racing Association, Inc., which owned and operated a horse racing track known as Suffolk Downs (R. 6). At that time there was a government ban on horse racing throughout the country (R. 7). The receivers ousted the former trustees from control of the Racing Association, caused themselves and their appointees to be elected, made Mr. Goode treasurer, and successfully operated the track during the 1945 racing season, producing dividends for the receivership estate of $360,000. Subsequently, upon their petition to the District Court, the receivers sold the shares at public auction on May 1, 1946, for $3,600,000, showing a profit to the Trust over the cost of the shares of $2,400,000 (R. 11).*

*The allegations in the petition that Mr. Proctor's statement of his time includes "time spent on matters not compensable by the receivership estate" (Pet'n, 6) and on "non-receivership matters" (Pet'n, 13) refers to Mr. Proctor's services in protecting this important asset of the Trust (R. 7-9).

The receivers also succeeded to the defense of a pending equity suit against the Trust to rescind an exchange of securities between the Trust and a corporation in which Mr. Aldred had been president and a director.* The securities which the complainant sought to get back from the Trust attained during the course of the litigation a value of $440,000. The stock which the Trust had given in exchange was worth nothing. The receivers were joined as parties respondent and Mr. Proctor thereafter conducted the litigation, tried the case, obtained a decision dismissing the bill with costs, and upon an appeal won the case before the Massachusetts Supreme Judicial Court, thus saving the Trust substantially $440,000 (R. 14, 15).†

The large blocks of the securities held by the Trust, lists of which also appeared in the exhibits (Ex. 1, R. 55), involved difficult problems, some of which are described in the receivers' statement (R. 13, 14).

At pages 22-23 of the petition is the following statement which is flagrantly false:

> "The business of an investment trust is the purchase and sale of securities, the collection of dividends, and the distribution of profits, if any. Obviously, the receivers were not permitted to engage in such activities, and there is no pretense that they did; they merely

*_Murphy_ v. _Hanlon_, 322 Mass. 683.

†The allegations in the petition that "who tried the case and who took the evidence is not stated" (Pet'n, 10) and that the *only legal service* performed by Mr. Proctor (in this matter) was the preparation of findings, that he spent "practically (a) a whole day" arguing the case in the Superior Court and collaborated in preparing the brief and argued the case before the Full Court (R. 9), would seem to be a deliberate misstatement. Besides the statement that Mr. Proctor conducted the litigation (R. 15), the Courts below had as an exhibit before them the entire record of the case on appeal, with all the testimony, showing that Mr. Proctor tried the case (R. 55, Ex. 2).

sold off the assets of the Trust when directed so to do by the Court."

As to *purchase and sale of securities,* during the first year and a quarter of the receivership the market was rising and the securities which the receivers held, with a single exception, were sound and their market value constantly rising. The receivers were constantly engaged in investigation and research into the value of these securities, and as soon as they believed that the market was near its peak they disposed of the bulk of them (R. 12, 13). As fast as the securities were sold, they reinvested the proceeds in short-term government notes and upon the maturity of such notes reinvested in other government notes, so that they constantly kept the bulk of the trust assets in income-producing securities (Financial Reports, Ex. 1).

With respect to the *collection of dividends,* the receivers collected altogether $689,184.03, plus interest on government notes of $77,445.65 (Financial Reports, Ex. 1).

With respect to *distribution of profits,* the receivers have distributed in the form of interest on debentures $685,875.00 (Receivers' Statement, R. 7).

In addition to these normal activities of an investment trust, the receivers, as above stated (p. 4), during the first year of their administration, managed and operated Eastern Racing Association by reason of the Trust's majority stock interest therein.

The receivers did not "*merely sell off the assets of the Trust when directed to do so by the Court.*"

The only asset which the receivers sold at the direction of the Court was the stock of Eastern Racing Association, and that direction was on their own initiative and petition filed February 13, 1946 (Record, *Bailey* v. *Proctor,* Oct. Term, 1945, No. 4185, p. 49), allowed, after hearing, over the vigorous protest of these petitioners, on March 13, 1946 (same Record, pp. 86, 87).

The sale of other securities of the Trust and the reinvestment of the proceeds in government short-term securities began in March, 1946, continuing in April, May and June (Receivers' Statement, R. 12).* This period of selling bore no relation to the Court's order of June 19, 1946, to liquidate, most of the sales preceding that order, but was dictated solely by the receivers' judgment that the market had reached its peak, as the subsequent event proved (R. 12).†

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*The proceeds from sales of securities (exclusive of Eastern Racing), as shown by the receivers' monthly accounts to the Court, were:

March	$50,947.45
April	139,621.87
May	659,539.17
June	1,076,634.99
	$1,926,743.48

†The judgment of January 19, 1945, under which the receivers were appointed, provided:

> "That Edward O. Proctor, of Newton, and Edward F. Goode of Boston, be and they hereby are appointed receivers for the defendant, the Aldred Investment Trust, and all of the property of the defendant Trust, . . . *to run and operate such property and the business of the defendant Trust* and to collect and receive the rents, issue, profits and income thereof and therefrom, to make such payments and disbursements as may be needful and proper in the operation of such property and business by the receivers, and to incur such expense as may be necessary or advisable in the operation thereof and to enter into contracts in the regular course of conduct of the business of the defendant Trust; *in general, to operate the property and business of the defendant Trust in the manner best calculated in the opinion of said receivers fully to protect the business and property and good will and value of the rights of the defendant Trust and to prevent the sacrifice thereof, and to purchase, and to sell and deliver securities of the defendant Trust*" (Record, *Bailey* v. *Proctor*, Oct. Term, 1945, No. 4185, pp. 27, 29) (italics ours).

It was not until June 19, 1946, that the receivers were ordered to liquidate the Trust. On that date the District Court for the

ARGUMENT.

1. THE ALLOWANCE OF FEES TO THE RECEIVERS RESTS IN THE SOUND DISCRETION OF THE DISTRICT COURT AND IS NOT REVIEWABLE EXCEPT WHERE A CLEAR ABUSE OF DISCRETION IS APPARENT.

Crites, Incorporated, v. *Prudential Insurance Co.,* 322 U.S. 408, 418 (1944).

Trustees v. *Greenough,* 105 U.S. 527, 537 (1881).

May v. *Midwest Refining Co.,* 121 F. (2d) 431, 440 (C.C.A. 1st 1941); cert. den. 314 U.S. 668 (1941).

Gochenour v. *Cleveland Terminals Bldg. Co.,* 142 F. (2d) 991 (C.C.A. 6th 1944); cert. den. 323 U.S. 767.

2. IN CONSIDERING WHETHER THERE WAS AN ABUSE OF DISCRETION THE APPELLATE COURT TAKES INTO CONSIDERATION THE TRIAL JUDGE'S PERSONAL KNOWLEDGE AND FAMILIARITY WITH THE NATURE OF THE PROBLEMS INVOLVED IN THE LITIGATION AND THE CHARACTER OF THE SERVICES RENDERED.

In his memorandum of decision the District Judge records that his determination was made upon a review of all the statements and documents "in the light of its [his] own

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first time rejected proposed plans of reorganization and directed that "the receivers are hereby ordered to proceed to liquidate the Trust" (Record, *Bailey* v. *Proctor,* Oct. Term, 1945, No. 4185, p. 131).

Even then the mandate to liquidate was not conclusive, for these petitioners procured a stay of the order and appealed to the Circuit Court of Appeals and, upon affirmation on February 24, 1947 (160 F. (2d) 78), applied to this Court for certiorari, which was not denied until June 2, 1947 (331 U.S. 834).

It was therefore not until June 2, 1947, that the receivers could proceed on the assurance that the Trust was to be liquidated.

close supervision over the affairs of the receivership from its inception" (Memorandum of Decision, R. 30). And at the hearing, when counsel for the appellants indicated a desire to call Receiver Goode to the stand to be questioned as to his "professional training and what his earning power is" (R. 47), the Court said: "No, I don't think it is necessary. It has never been done in these cases. Here we know what we are dealing with. I have a very good knowledge of Mr. Goode's background and business judgment. . . ."

The Appellate Court takes into consideration the trial judge's familiarity with the situation, especially where that appears, as here, a matter of record.

> *Gochenour* v. *Cleveland Terminals Bldg. Co.*, 142 F. (2d) 991 (C.C.A. 6th 1944); cert. den. 323 U.S. 767.
>
> *Bailey* v. *McLellan*, 159 F. (2d) 1014 (C.C.A. 1st 1947).
>
> *Godfrey* v. *Powell*, 159 F. (2d) 330, 331 (C.C.A. 5th 1947).
>
> *Sullivan & Cromwell* v. *Colorado Fuel & Iron Co.*, 96 F. (2d) 219 (C.C.A. 10th 1938).
>
> *In re Tower Bldg. Corporation*, 88 F. (2d) 347 (C.C.A. 7th 1937).

In the instant case, moreover, the Court of Appeals also was thoroughly familiar with the receivership, as noted in its opinion: "We are quite familiar with this receivership as a result of our consideration of numerous previous appeals," citing six appeals (R. 60).

3. The record is sufficiently clear and definite to serve as a foundation for the granting of the allowance.

There was evidence in the record which, taken together with the District Judge's personal knowledge and familiarity with the case, was sufficiently full, clear and definite to support the District Court's decision.

While Mr. Gould's statement for these petitioners (R. 21-29) complained that the original statement of the receivers (R. 5-19) contained insufficient information about the time spent by the receivers, he conceded at the hearing that the receivers' supplementary statement (R. 19-20) "to a large extent" "rectified" "that deficiency" (R. 39); and see the District Court's Memorandum (R. 30).

There is no rule of law requiring the itemization of time spent.

> *Stein* v. *Hemker*, 157 F. (2d) 740 (C.C.A. 8th 1946).

Certainly under the circumstances in the present case such an itemization was not indispensable and would not have been particularly helpful.

Receiver Goode "devoted his time exclusively to Aldred Investment Trust, including Eastern Racing Association." After the securities (excepting Eastern Gas & Fuel preferred) were sold, he spent an average of about one-half of each working day (R. 20), and his employment as receiver required his resignation from Spencer Trask & Company since the New York Stock Exchange would not permit an employee of a member firm to devote his time to looking after the affairs of an investment trust (R. 19), so that it was not possible for him to resume his former position while employed as receiver (R. 20). The general character of Receiver Goode's services is fully set out in the receivers' statement (R. 5-20).

With respect to Receiver Proctor, besides the usual duties of a receiver, he acted as general counsel for the receivers, as well as Eastern Racing Association until the receivers sold its stock on May 1, 1946, and represented the receivers in all matters of litigation (Statement, R. 20). He submitted a statement of the number of hours shown by the books of Ropes, Gray, Best, Coolidge & Rugg spent on Aldred Investment matters, including Eastern Racing Association, showing 776 hours plus 175¾ spent on the case of *Murphy* v. *Hanlon et als.* In addition to this their books show 160 hours spent by other men in the office assisting Proctor on Aldred Investment Trust matters. The office records of Dever & Proctor show 178 hours spent on Aldred Investment Trust matters, plus 87¼ hours in the case of *Murphy* v. *Hanlon*, the total time charges for Proctor aggregating 1217 hours (R. 20).

The foregoing information was adequate to enable the Court to determine the time properly required to be spent on the matter, which is, of course, one of the elements, but by no means the only one, to be taken into consideration.

With respect to the other important elements in the fixing of the receivers' compensation the record is complete and explicit. Such are (1) the value of the property involved, (2) the difficulty of the problems and (3) the results achieved.

4. The compensation fixed by the District Court was within the reasonable exercise of its discretion.

The District Court was fully justified in fixing the compensation of the receivers at $245,000.*

*The application for the final allowance of $170,000 was filed jointly by the receivers, who have throughout shared the fees of the receivership equally as they have shared the duties and responsibilities equally.

A. First, with respect to *the amount of property involved,* it represents approximately two and seven tenths per cent (.0272) of the $9,000,000 assets administered by the receivers, a percentage which is not at variance with the standards of the Bankruptcy Act where the receivers conduct the business of the bankrupt, and taking into consideration the fact that one of the receivers acted throughout as counsel for the receivers (Memorandum of Decision, R. 32).

B. As to *the difficulties involved,* there were many, including more particularly (1) the management for a year of Eastern Racing Association and the sale of that important asset of the Trust; (2) the investigation into the affairs of corporations of which the Trust held large blocks of securities, to determine whether such securities should be held or sold and the favorable times for sale; (3) whether the Trust should be reorganized or liquidated; (4) the conduct of the litigation itself, both in the District Court and the Circuit Court of Appeals; and (5) the preparation, trial and argument on appeal of the *Murphy* v. *Hanlon* case, all of which are fully described in the receivers' statement (R. 6-18).

C. As to *the results obtained,* they are briefly summarized in the receivers' statement:

> "On July 1, 1947, the $5,900,000 of debentures were paid in full, with accrued interest. Interest payments during the receivership totaled $685,875. The 171,500 common shares which at the beginning of the receivership had no value, now have a liquidating value of approximately $10.40 a share, of which $5.50 a share has already been paid by way of partial distribution. This applies both to the 59,000 shares attached to the debentures and the 112,500 so-called 'free' shares.

> During the receivership, therefore, a deficit of approximately $2,300,000 has been changed into an equity of almost $1,800,000" (R. 7).

The petitioners sought to belittle the receivers' share in accomplishing this result by claiming that it was due to "mere chance" and to their own efforts in publicizing the value of Eastern Racing shares (Attorney Gould's Statement, R. 25-27), but the District Court, in the light of its own intimate knowledge of the situation, found:

> "While it is true that the favorable result of the receivership in converting a deficit of $2,300,000 into an equity of substantially $1,800,000, could not have been obtained without the rise in the security market and the temporary extraordinary public interest in horse racing combined with easy money at the time of the receivers' sale of the Eastern Racing Association shares, this result was in large measure attributable to the judgment of the receivers both as to the time and methods of disposing of this asset of the Trust. The receivers disposed of the general securities of the Trust at prices not far from the highest in the market range during the receivership, and it is common knowledge that the market has since experienced pronounced recessions. I think that it is generally conceded by everyone that the Eastern Racing Association shares were sold at the very peak of the market, and that their present value is much less than at the time of the receivers' sale." (Memorandum of Decision, R. 31.)

Petitioners at the hearing below (R. 44, 45) and in their brief here (Point VI, pp. 24-26) argue that the District Court in evaluating the receivers' services was bound to

find that they contributed nothing to the favorable outcome of the receivership because the Circuit Court of Appeals in *Bailey* v. *McLellan*, 159 F. (2d) 1014, stated in the course of its opinion:

> "The fact that the market for securities rose during this protracted period and that the sale of the racing association stock was an advantageous one was mere chance . . ."

This remark, however, was made in answer to a claim by the attorney for the ousted trustees to have his compensation paid out of the Trust assets, on the ground that his protraction of the defense pushed the case into a period of higher values (Record, *Bailey* v. *McLellan*, Oct. Term 1945, No. 4197, at p. 81). Certainly, so far as said attorney's services were concerned, the fact that they were followed by trebling of the Trust assets was purely fortuitous. It was a case of *post hoc, non propter hoc.*

The District Judge, therefore, was entirely justified, when the passage was quoted at the hearing below, in saying: "I won't accept that statement. I think it was a remarkable figure, obtaining the price that they did. If you look at the history of the stock sales you will find you got about the high in the sales. That is not chance. I won't accept that statement of the Circuit Court of Appeals" (R. pp. 44, 45), and in his memorandum of decision the Judge found that the favorable result of the receivership "was in large measure attributable to the judgment of the receivers both as to the time and methods of disposing of this asset [Eastern Racing Association shares] of the Trust" and that "the receivers disposed of the general securities of the Trust at prices not far from the highest in the market range during the receivership" (R. 31).

The petitioners' claim that the credit for the advantageous sale of the Eastern Racing Association stock was

due to them and not to the receivers (Pet'n, Point VI, pp. 24-26) has never received judicial acceptance.

5. THE DISTRICT COURT TOOK INTO CONSIDERATION THE SUM PAID TO RECEIVER GOODE BY EASTERN RACING ASSOCIATION AND WAS JUSTIFIED IN NOT DIMINISHING THE PRESENT ALLOWANCE BY THAT SUM.

Petitioners' claim that "sums paid to receiver Goode by Eastern Racing Association should have been deducted from any allowance to him as receiver" refers to the $25,000 paid him for his services as treasurer of that Association during the year of its operation by the receivers.

The cases cited by the petitioner are to the effect that salaries paid to receivers must "be taken into consideration in the fixing of their allowances" (Pet'n, 19).

The District Judge did take into consideration the sum paid Mr. Goode, as stated in his memorandum of decision (R. 31, 32), and his decision on this point clearly was not an abuse of discretion.

CONCLUSION.

In conclusion, the receivers respectfully submit that there was neither error of law nor abuse of discretion in this case and that this petition should be denied.

Respectfully submitted,

EDWARD O. PROCTOR, for himself and
EDWARD F. GOODE as Receivers.